

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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5 WILLIAM SORGEN,  
6 Plaintiff,  
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v.

9 THE CITY AND COUNTY OF SAN  
10 FRANCISCO, SAN FRANCISCO  
11 POLICE CHIEF HEATHER FONG,  
12 SAN FRANCISCO POLICE  
13 OFFICER BRIAN OLIVER (#776)  
14 AND DOES 1-20,

15 Defendants.  
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CASE NO. 05-CV-03172 TEH  
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ORDER GRANTING  
DEFENDANTS' MOTION  
FOR REVIEW OF CLERK'S  
TAXATION OF COSTS

This matter comes before the Court on Defendants' Motion for Review of Clerk's Taxation of Costs. Having carefully reviewed the parties' papers, and the record herein, the Court GRANTS Defendants' Motion for Review of Clerk's Taxation of Costs for the reasons stated herein. The Court further orders that Plaintiff shall pay Defendants' costs in the amount of \$4,987.

**BACKGROUND**

On September 7, 2006, this Court granted Defendant's motion for Summary Judgment on all claims except one state law claim. On October 5, 2006, this Court declined to exercise supplemental jurisdiction over the remaining state law claim and granted Plaintiff's request for remand to state court.

On October 18, 2006, Defendants filed a bill of costs in the amount of \$4,987 for court fees and other costs associated with the litigation. On October 30, 2006, Plaintiff filed an opposition to strike Defendants' bill of costs arguing that (1) Defendants have waived their costs due to untimely filing, and (2) Defendants are not prevailing parties because a

1 final judgment has not been entered. Alternatively, he argues that costs should be denied to  
2 prevent a chilling effect on other civil rights litigants pursuing litigation against the State.

3 Upon review of the parties' papers, the Clerk of the Court denied the taxation of costs  
4 on November 20, 2006 reasoning that a "judgment has not been entered." On November 29,  
5 2006, Defendants filed the instant motion to review the Clerk's denial of costs. Defendants  
6 contend that the bill of costs was timely filed, that they are prevailing parties in the action  
7 and are entitled costs because a remand order is considered a "judgment" within the meaning  
8 of Rule 54. Defendants further contend that Plaintiff has not supported his contention that  
9 costs should be denied due to the potential chilling effect on civil right's litigants.

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## 11 **LEGAL STANDARD**

12 Rule 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of  
13 course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1).  
14 This rule creates a presumption in favor of awarding costs to the prevailing party. *Ass'n of*  
15 *Mexican-American Educators v. State of Calif.*, 231 F.3d 572, 591 (9th Cir. 2000)(en banc).

16 The federal rule provides little guidance as to the time to file a motion to recover  
17 costs. However, under this District's local rules, a prevailing party must file a bill of costs no  
18 later than 14 days after entry of judgment. Civ. L. R. 54-1. A party may oppose the bill of  
19 costs within 10 days after service and file objections stating specific grounds as to each  
20 objection. Civ. L. R. 54-2(a). The parties are also required to meet and confer and make a  
21 good faith effort to resolve any disagreement. Civ. L. R. 54-2(b).

22 Generally, the Clerk of the Court makes the initial determination to tax the costs as  
23 submitted by the parties. 10 MOORE'S FEDERAL PRACTICE § 54.100[2] at 54-143 (3d ed.  
24 1997). The action of the clerk may be reviewed by the court by motion within 5 days after  
25 notice of the clerk's decision. Fed. R. Civ. P. 54(d)(1). However, if no such motion is filed  
26 within 15 days of the Clerk's taxation of costs, the Clerk's determination of costs shall be  
27 final. Civ. L. R. 54-5. A trial court has considerable discretion in awarding or denying costs.  
28 *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 233 (1964)(The judge has considerable

1 discretion “to decide the cost question himself”). On a timely motion for review, the district  
2 court makes a *de novo* determination of the costs at issue. *Lopez v. San Francisco Unified*  
3 *Sch. Dist.*, 385 F. Supp. 2d 981, (D. Cal. 2005). However, a court may not tax costs beyond  
4 those authorized by statute. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42  
5 (1986).

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## 7 DISCUSSION

8 As noted above, Defendants contend that they are entitled to costs because a final  
9 judgment was entered in their favor and thus they are prevailing parties within the meaning  
10 of Rule 54(d)(1). Plaintiff argues that Defendants are not prevailing parties because no final  
11 judgment has been entered, given the remaining issue in state court. Plaintiff further objects  
12 to Defendants’ bill of costs stating that it was untimely filed and that it would discourage  
13 future civil rights litigants from pursuing actions.

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### 15 1. The Bill Of Costs Was Timely Filed

16 While Rule 54(d)(1) is silent as to when to file a motion for taxation of costs, the  
17 local rules provide that “a prevailing party must file a bill of costs no later than 14 days after  
18 entry of judgment.” Civ. L. R. 54-1. Plaintiff argues that Defendants’ bill of costs was not  
19 timely because it was filed more than 14 days after the partial summary judgment ruling  
20 issued on September 7, 2006. Defendants contend that there was no judgement until October  
21 5, 2006, when this Court remanded the remaining state claim.

22 Partial summary judgments “are by their terms interlocutory.” *Liberty Mut. Ins. Co.*  
23 *v. Wetzel*, 424 U.S. 737, 744 (1976). The remand order, however, effectively eliminated  
24 federal jurisdiction as to all of Plaintiff’s claims, and thus constituted a judgment, as  
25 discussed *infra*, for purposes of Civil Local Rule 54-1. As such, Defendants’ Bill of Costs  
26 was timely because it was filed within 14 days of the October 5, 2006 order remanding the  
27 case to state court.

1    **2. The Remand Does Not Preclude Defendants' Bill of Costs**

2       Plaintiff also contends that Defendants' request for costs is premature because the  
3 remanded state claim has not yet been resolved.

4       It is generally understood that "the appropriate time for taxing costs is after a decision  
5 has been reached in the action." 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND  
6 PROCEDURE § 2679 at 482 (3d ed. 1998). The rule does not specifically require an entry of a  
7 valid final judgment. Moreover, the pending state action does not affect the finality of the  
8 federal litigation. *United States v. Rice*, 327 U.S. 742, 751-752 (1946); *Libhart v. Santa*  
9 *Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979). The federal litigation was complete  
10 once the federal claims were disposed of and the remaining state law claim was remanded.  
11 Indeed, at this point the federal court no longer had jurisdiction over any aspect of the case.  
12 Accordingly, the pendency of the state court claim does not preclude Defendants' bill of  
13 costs.<sup>1</sup>

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15    **3. Defendants Are "Prevailing Parties"**

16       Rule 54(d)(1) provides that a District Court has jurisdiction to tax costs as a matter of  
17 course to the "prevailing parties in the litigation. Fed. R. Civ. P. 54(d)(1)(citations omitted).  
18 Plaintiff argues that Defendants are not prevailing parties because (1) the case is still active  
19 in state court, and (2) Defendants did not prevail as to all issues in their Summary Judgment  
20 motion. Plaintiff's contentions are without merit.

21       A defendant is considered "the prevailing party when the proceeding is terminated by  
22 court-ordered dismissal or judgment in favor of defendant." *Contessa Food Prods. v.*  
23 *Lockpur Fish Processing Co.*, 2001 U.S. Dist. LEXIS 26000, \*32 (C.D. Cal. 2001)(*aff'd and*  
24 *rev'd on other grounds*). Additionally, a prevailing party is one that won at trial,  
25 irrespective of whether or not that party prevailed on all issues. *K-2 Ski Co. v. Head Ski Co.*,

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26       <sup>1</sup>The Court notes that while there is no Ninth Circuit authority relating to taxation of  
27 costs following a remand order, a Fourth Circuit unpublished opinion is directly on point. In  
28 *Lepore v. Ramsey*, 986 F.2d 1414 (4th Cir. 1993), the court affirmed taxation of costs after  
defendants prevailed on federal claims and state claims were remanded. *Id.* at \*2.

1 506 F.2d 471, 477 (9th Cir. 1974)(The court found that plaintiff was the prevailing party  
2 although he did not sustain his entire claim); *Manildra Milling Corp. v. Ogilvie Mills, Inc.*,  
3 878 F.Supp. 1417, 1424 (D. Kan. 1995). Here, this Court awarded summary judgment in  
4 favor of Defendants on all adjudicated claims except for the one claim that was remanded to  
5 state court. Further as discussed above, Plaintiff's pending state action does not effect the  
6 finality of the federal action. Defendants qualify as "prevailing parties" within the meaning  
7 of Rule 54(d)(1).

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#### 9 **4. Civil Rights Litigants Are Not Immune From Paying Costs**

10 Finally, Plaintiff contends that imposing costs on a civil rights litigant will cast a  
11 chilling effect on future civil rights cases, citing *Ass'n of Mexican-American Educators v.*  
12 *State of California*. That action involved difficult state-wide issues of public importance in  
13 which the cost bill totaled \$216,443.67. *Ass'n of Mexican-American Educators*, 231 F.3d at  
14 579. The district court denied costs to Defendants for the following reasons:

15 (1) the case 'involves issues of substantial public importance,' specifically  
16 'educational quality, interracial disparities in economic opportunity, and access  
17 to positions of social influence'; (2) there is great economic disparity between  
Plaintiffs, who are individuals and 'small nonprofit educational organizations',  
and the State of California; (3) the issues in the case are close and difficult; and  
18 (4) Plaintiffs' case, although unsuccessful, had some merit.

*Id.* at 592.

19 Plaintiff contends that economic disparity exists between Plaintiff and Defendants and  
20 that the instant case involves important legal questions. However, this case differs  
21 dramatically from *Ass'n of Mexican-American Educators* in many respects. *Ass'n of*  
22 *Mexican-American Educators* involved a state-wide test that affected minority teachers in the  
23 education system throughout California. *Id.* Here, Plaintiff's case concerns a challenge to an  
24 individual arrest. Nor has Plaintiff provided any evidence documenting indigency or  
25 inability to pay. Moreover, some courts have held that limited financial resources do not  
26 necessarily warrant denial of costs in all instances. *Ardalan v. Monterey Inst. of Int'l Studies*,  
27 2004 U.S. Dist. LEXIS 18765, \*8 (N.D. Cal. 2004); *Smith v. Southeastern Pa. Transp. Auth.*,  
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1 47 F.3d 97, 100 (3d Cir. 1995)(The court held that a losing party's inability to pay does not  
2 automatically exempt it from the taxation of costs). Further, the relatively modest amount of  
3 costs at issue is unlikely to chill future civil rights litigants. *Save Our Valley v. Sound*  
4 *Transit*, 335 F.3d 932, 946 (9th Cir. 2002)( The court found that denial of costs were not  
5 warranted as “no such injustice will result from [an] award of \$ 5,310.55”); *Monterey Inst. of*  
6 *Int'l Studies*, 2004 U.S. Dist. LEXIS at \*13 (An award of \$ 2,838.35 is not such an exorbitant  
7 amount to chill future civil rights litigants)(citations omitted).

8 While the Court is not insensitive to Plaintiff's argument, it is not persuaded that this  
9 is an instance where denial of costs is required to avoid a chilling effect in future cases.  
10 *Odbert v. U.S.*, 576 F. Supp. 825, 828 (E.D. Cal. 1983).

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12 **5. The Costs Sought By Defendant Are Warranted By The Rules**

13 Defendants seek costs in the amount of \$4,987 for the following items: Fees for the  
14 Clerk: \$250, Fees for Service: \$13, Court Reporter Fees: \$4,624 and Fees for Witnesses:  
15 \$100. These costs are warranted under both 28 U.S.C. § 1920 and Civil Local Rule 54-3.

16 Civil Local Rule 54-2 provides that the Plaintiff must specifically object to each item  
17 in the bill of costs within 10 days after service. Plaintiff has had two instances to object to  
18 Defendants' costs, after Defendants filed their bill of costs and after Defendants filed a  
19 motion to review the Clerk's taxation of costs. Plaintiff has failed to object in either instance  
20 and instead requests that the Court set a briefing schedule so that he may object to  
21 Defendants' costs. This Court declines to set a briefing schedule when Plaintiff has had two  
22 instances to object but failed to do so. Plaintiff has not challenged Defendants' costs, either  
23 showing that they are unreasonable, unnecessary or improper. 10 WRIGHT, MILLER &  
24 KANE, FEDERAL PRACTICE AND PROCEDURE § 2668 at 232-238. Accordingly, Defendants'  
25 request for costs shall be approved for the amount requested.

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1 **CONCLUSION**

2 Accordingly, and good cause appearing, it is HEREBY ORDERED that Defendants'  
3 Motion For Review of Clerk's Taxation of Costs is GRANTED and Plaintiff's Motion to  
4 Strike Defendants' Bill of Costs is DENIED.

5 Defendants are entitled to the following costs: Fees for the Clerk: \$250, Fees for  
6 Service: \$13, Court Reporter Fees: \$\$4,624 and Fees for Witnesses: \$100, totaling \$4,987.

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8 **IT IS SO ORDERED.**

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10 DATED 2/14/07



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THELTON E. HENDERSON, JUDGE  
12 UNITED STATES DISTRICT COURT  
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